

9 September 2021

Committee Secretary
Senate Select Committee on Job Security
Department of the Senate
PO Box 6100
Canberra ACT 2600

By email: jobsecurity.sen@aph.gov.au

Thank you for your email dated 11 August 2021, addressed to Ms Rebecca Flowers, inviting Maurice Blackburn's input on the recommendations in the Committee's first interim report, titled '*On-demand platform work in Australia*'.

We believe that the Committee has produced an excellent, important and timely interim report.

Maurice Blackburn endorses all 15 recommendations.

We provide the following comments for the Committee's consideration.

Recommendations 1, 2 & 3

Maurice Blackburn is fully supportive of recommendations aimed at improving data collection around on-demand and insecure work.

We agree with the sentiment expressed in the Interim Report that:

[The] lack of robust, reliable data has restricted the committee's ability to identify the true size and nature of the on demand workforce. The committee believes it is critical that this gap in our national knowledge-base be filled through the regular collection and publication of robust data by the Australian Bureau of Statistics and Safe Work Australia.¹

¹ Draft Interim Report: para 2.65

We believe that the enhancements to the mechanisms outlined in Recommendations 1, 2 & 3 are appropriate, and, if adopted, would add considerably to our national understanding of the prevalence and nature of insecure and on-demand work in Australia.

Recommendations 4, 5 & 6

Maurice Blackburn agrees that the use of the model Workplace Health and Safety Laws to improve worker access to a safe workplace in the on-demand platform/gig economy sector is entirely appropriate. The provision of appropriate advice to platforms and other PCBUs in relation to their responsibilities would be a welcome step forward.

We specifically note the section of Recommendation 5 which reads:

The guidance should not seek to unreasonably circumvent the obligations of on-demand companies through novel interpretations of workers as being a 'person conducting a business or undertaking' (PCBU), particularly when such workers in the on-demand sector are engaged in highly dependent or low-leverage work arrangements.

We believe this is a critical inclusion. Too often, in our experience, employers are utilising non-traditional employer/employee relationships to sidestep their responsibilities for ensuring a safe work environment for workers.

We see the use of the model Workplace Health and Safety Laws as an appropriate, nationally driven approach to achieving better coverage for workers, pending the definitional adjustments to legislation advocated in other recommendations.

We applaud the Committee for their inclusion of Recommendation 6, aimed at ensuring that on-demand workers are not excluded from workers' compensation schemes. We fully support this initiative.

Maurice Blackburn notes that the Joint Select Committee on Road Safety² is also looking at similar issues.³ We encourage both Committees to seek to ensure that the findings and recommendations from both Committees are aligned and consistent.

Recommendation 7

Maurice Blackburn is fully supportive of the recommendation that the Australian Government expands the definitions of 'employment' and 'employee' in the *Fair Work Act 2009* to capture new and evolving forms of work.

We encourage the Committee to be very specific in what it wants to see captured in these expanded definitions, in order to minimise the risk of creating loopholes which employers/platforms might seek to exploit.

The High Court's recent emphasis on the *terms of the contract*, rather than the *nature of the employment relationship* makes it increasingly difficult to address the power asymmetry which permeates the current position. Legislative change is needed to readjust this imbalance.

² https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Road_Safety_2021/RoadSafety2021Joint

³ Ref

[https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Road_Safety_2021/RoadSafety2021Joint/Terms_of_Reference:Term of Reference \(e\)](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Road_Safety_2021/RoadSafety2021Joint/Terms_of_Reference:Term%20of%20Reference%20(e))

Recommendation 8

Maurice Blackburn is fully supportive of the exploration of options for a Federal regulator to be empowered to request data from platforms that employ and contract workers.

We would suggest that it would be useful to include an additional dot point to the list of data that could be collected:

- Incidents of workplace harassment (including sexual harassment) and bullying

We believe that the empowerment of a Federal regulator to require data from platforms should aim to include all data that demonstrates the safety of workers engaged by that platform.

Recommendations 9, 10 & 11

Maurice Blackburn is supportive of these recommendations, aimed at providing workers with easier and fairer access to dispute resolution processes, providing better pathways to permanent/more secure work, and providing advice on employment relationships.

Once again, we believe that the adoption of these recommendations would greatly enhance the experience of workers in the gig and on-demand workforce.

Recommendations 12, 13, & 14

Maurice Blackburn is pleased to see the specific focus in the recommendations on workers within the disability services sector.

As noted in our original submission to this inquiry, Maurice Blackburn holds significant concerns about the apparent 'Uberisation' of the disability support workforce.

We do not share the belief that 'flexibility' is core to ensuring that the disability support workforce is sufficient to meet demand. In fact, we believe that quite the opposite is true.

We are concerned that the appearance of a highly casualised, piecemeal approach to work will deter potential new entrants into the disability sector workforce, particularly with respect to carers.

In our opinion, a high-quality, better skilled workforce is needed if the quality of support – especially to individuals with complex needs – is to improve.

Maurice Blackburn has long advocated that measures should be put in place to enhance skills training and capacity of the disability workforce. This would be a major, long-term investment, ultimately paying dividends in participant safety and community confidence in the scheme. The disability service workforce needs the protection of agreed minimum wages, agreed minimum shift length, and agreed minimum employment standards.

Strategies to address the growing shortage of workers through greater flexibility risk either reducing quality standards or increasing costs, or both. It should not be permitted to bring a 'lowest common denominator' approach to the provision of services to eligible individuals.

There must be sufficient and properly qualified staff available Australia-wide. The risks in not adopting that approach are plain:

- Unscrupulous entities and individuals will enter the market, seeking to exploit the funds available;
- Unskilled and untrained workers will be recruited to work with people with complex multifaceted needs;
- Those workers will be highly vulnerable to exploitative conduct by their employing entity;
- Participants will suffer detriment as a consequence; and
- The intended benefits in increased workforce participation will be illusory.

It is important to recognise that:

- The disability services workforce is made up of some of the most vulnerable worker cohorts in Australia,
- These vulnerable cohorts of workers are particularly susceptible to actions of unscrupulous employers,
- The power asymmetry between workers and employers is at its most stark within vulnerable and marginalised cohorts of workers,
- The sector is vulnerable to sham contracting arrangements, with workers told they must be independent contractors rather than traditional employees. These employees are then missing out on superannuation, insurances, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect,
- The direct engagement of support staff is complex and fraught, and may be inappropriate for many vulnerable participants, and
- The most precarious employment markets are also much less likely to be unionised. It is crucial that the NDIA liaise with the union movement on any structural enhancements that can be put in place to ameliorate exploitative working arrangements.

We agree that it is essential that technology based employment matching services actually employ their staff, rather than merely connect contractors to clients.

In order to compete with other care sectors (such as health and aged care), the employment conditions within organisations registered to provide NDIS services must be first rate. Coordinated engagement with unions is one key way to ensure a race to the bottom does not accelerate.

Maurice Blackburn would like to see NDIA's procurement processes for service provision have far higher expectations on the credentials of the applicant firm as an employer of choice. If a firm cannot provide details of their employment model and processes, they should not be registered as an NDIA provider

We specifically note the final dot point in Recommendation 12, which highlights:

.... the potential for NDIS recipients to be classified as persons conducting a business or undertaking (PCBUs) under existing Work Health and Safety laws.

Maurice Blackburn is aware of confusion already existing as to whether a scheme participant can be held as a PCBU for someone working for them at their house. We join with the Committee in urging the Joint Standing Committee on the National Disability Insurance Scheme to ensure this additional pressure is not placed on the recipient of the services.

Recommendation 15

We endorse this recommendation. We believe that government procurement processes are a lever which should be used to ensure that anyone applying to provide services on behalf of the government (including in the NDIS, as mentioned above) have appropriate employment processes in place.

Once again, we congratulate the Committee on the development of this important and informative interim report. Please do not hesitate to contact me and my colleagues on

if we can further assist with the Committee's important work.

Giri Sivaraman
Principal Lawyer
MAURICE BLACKBURN